

Introduced by Senator Anderson

February 17, 2016

An act to amend Sections 1560, 1561, and 1563 of the Evidence Code, relating to evidence.

LEGISLATIVE COUNSEL'S DIGEST

SB 1087, as introduced, Anderson. Evidence: production of business records.

Existing law provides that when a subpoena duces tecum is served upon the custodian of records or other qualified witness of a business in a criminal action in which the business is neither a party nor the place where any cause of action is alleged to have arisen, and the subpoena requires the production of all or any part of the records of the business, it is sufficient compliance therewith if the custodian or other qualified witness, within five days after the receipt of the subpoena or within a time otherwise agreed upon, delivers a copy of all the records described in the subpoena to the clerk of the court, the judge, or another person, as specified. Existing law requires that the records be accompanied with an affidavit from the custodian attesting to specified information.

Existing law also provides for the service of search warrants for the seizure business records, as specified.

This bill would authorize a custodian of business records to comply with a search warrant for certain business records by delivering a true, legible, and durable copy of all of the records described in the search warrant to the law enforcement agency ordered to execute the search warrant, if the warrant provides for compliance in that manner. The bill would require that the records be delivered within 5 days of receipt of the search warrant or such other time as is specified in the search warrant. The bill would require that the records be accompanied by an

affidavit of the custodian of records attesting to the same information that is required with respect to a subpoena duces tecum.

Existing law authorizes all reasonable costs, as specified, incurred by a nonparty witness to be charged against the party serving the subpoena duces tecum.

This bill would make technical, nonsubstantive changes to those provisions.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1560 of the Evidence Code is amended
2 to read:
3 1560. (a) As used in this article:
4 (1) “Business” includes every kind of business described in
5 Section 1270.
6 (2) “Record” includes every kind of record maintained by a
7 business.
8 (b) Except as provided in Section 1564, when a subpoena duces
9 tecum is served upon the custodian of records or other qualified
10 witness of a business in an action in which the business is neither
11 a party nor the place where any cause of action is alleged to have
12 arisen, and the subpoena requires the production of all or any part
13 of the records of the business, it is sufficient compliance therewith
14 if the custodian or other qualified witness delivers by mail or
15 otherwise a true, legible, and durable copy of all of the records
16 described in the subpoena to the clerk of the court or to another
17 person described in subdivision (d) of Section 2026.010 of the
18 Code of Civil Procedure, together with the affidavit described in
19 Section 1561, within one of the following time periods:
20 (1) In any criminal action, five days after the receipt of the
21 subpoena.
22 (2) In any civil action, within 15 days after the receipt of the
23 subpoena.
24 (3) Within the time agreed upon by the party who served the
25 subpoena and the custodian or other qualified witness.
26 (c) The copy of the records shall be separately enclosed in an
27 inner envelope or wrapper, sealed, with the title and number of
28 the action, name of witness, and date of subpoena clearly inscribed

1 thereon; the sealed envelope or wrapper shall then be enclosed in
2 an outer envelope or wrapper, sealed, and directed as follows:

3 (1) If the subpoena directs attendance in court, to the clerk of
4 the court.

5 (2) If the subpoena directs attendance at a deposition, to the
6 officer before whom the deposition is to be taken, at the place
7 designated in the subpoena for the taking of the deposition or at
8 the officer's place of business.

9 (3) In other cases, to the officer, body, or tribunal conducting
10 the hearing, at a like address.

11 (d) Unless the parties to the proceeding otherwise agree, or
12 unless the sealed envelope or wrapper is returned to a witness who
13 is to appear personally, the copy of the records shall remain sealed
14 and shall be opened only at the time of trial, deposition, or other
15 hearing, upon the direction of the judge, officer, body, or tribunal
16 conducting the proceeding, in the presence of all parties who have
17 appeared in person or by counsel at the trial, deposition, or hearing.
18 Records that are original documents and that are not introduced
19 in evidence or required as part of the record shall be returned to
20 the person or entity from whom received. Records that are copies
21 may be destroyed.

22 (e) As an alternative to the procedures described in subdivisions
23 (b), (c), and (d), the subpoenaing party in a civil action may direct
24 the witness to make the records available for inspection or copying
25 by the party's attorney, the attorney's representative, or deposition
26 officer as described in Section 2020.420 of the Code of Civil
27 Procedure, at the witness' business address under reasonable
28 conditions during normal business hours. Normal business hours,
29 as used in this subdivision, means those hours that the business of
30 the witness is normally open for business to the public. When
31 provided with at least five business days' advance notice by the
32 party's attorney, attorney's representative, or deposition officer,
33 the witness shall designate a time period of not less than six
34 continuous hours on a date certain for copying of records subject
35 to the subpoena by the party's attorney, attorney's representative,
36 or deposition officer. It shall be the responsibility of the attorney's
37 representative to deliver any copy of the records as directed in the
38 subpoena. Disobedience to the deposition subpoena issued pursuant
39 to this subdivision is punishable as provided in Section 2020.240
40 of the Code of Civil Procedure.

(f) *If a search warrant for business records is served upon the custodian of records or other qualified witness of a business in connection with an action or investigation in which the business is neither a party nor the place where any cause of action is alleged to have arisen, and the search warrant provides that the warrant will be deemed executed if the business causes the delivery of records described in the warrant to the law enforcement agency ordered to execute the warrant, it is sufficient compliance therewith if the custodian or other qualified witness delivers by mail or otherwise a true, legible, and durable copy of all of the records described in the search warrant to the law enforcement agency ordered to execute the search warrant, together with the affidavit described in Section 1561, within five days after the receipt of the search warrant or within such other time as is set forth in the warrant. This section does not abridge or limit the scope of search warrant procedures set forth in Chapter 3 (commencing with Section 1523) of Title 12 of Part 2 of the Penal Code or invalidate otherwise duly executed search warrants.*

SEC. 2. Section 1561 of the Evidence Code is amended to read:

1561. (a) The records shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following:

(1) The affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records.

(2) The copy is a true copy of all the records described in the subpoena duces tecum *or search warrant*, or pursuant to subdivision (e) of Section 1560 the records were delivered to the attorney, the attorney's representative, or deposition officer for copying at the custodian's or witness' place of business, as the case may be.

(3) The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event.

(4) The identity of the records.

(5) A description of the mode of preparation of the records.

(b) If the business has none of the records described, or only part thereof, the custodian or other qualified witness shall so state in the affidavit, and deliver the affidavit and those records that are available in one of the manners provided in Section 1560.

(c) ~~Where~~*If* the records described in the subpoena were delivered to the attorney or his or her representative or deposition officer for copying at the custodian's or witness' place of business, in addition to the affidavit required by subdivision (a), the records shall be accompanied by an affidavit by the attorney or his or her representative or deposition officer stating that the copy is a true copy of all the records delivered to the attorney or his or her representative or deposition officer for copying.

SEC. 3. Section 1563 of the Evidence Code is amended to read:

1563. (a) This article ~~shall not be interpreted to~~ *does not* require tender or payment of more than one witness fee and one mileage fee or other charge, to a witness or witness' business, unless there is an agreement to the contrary between the witness and the requesting party.

(b) All reasonable costs incurred in a civil proceeding by ~~any a witness which~~ *who* is not a party with respect to the production of all or any part of business records ~~the production of which is~~ requested pursuant to a subpoena duces tecum ~~may~~ *shall* be charged against the party serving the subpoena duces tecum.

(1) "Reasonable ~~cost,~~" *costs,*" as used in this section, ~~shall include, but not be limited to,~~ *includes* the following specific costs: ten cents (\$0.10) per page for standard reproduction of documents of a size 8½ by 14 inches or less; twenty cents (\$0.20) per page for copying of documents from microfilm; actual costs for the reproduction of oversize documents or the reproduction of documents requiring special processing which are made in response to a subpoena; reasonable clerical costs incurred in locating and making the records available to be billed at the maximum rate of twenty-four dollars (\$24) per hour per person, computed on the basis of six dollars (\$6) per quarter hour or fraction thereof; actual postage charges; and the actual cost, if any, charged to the witness by a third person for the retrieval and return of records held offsite by that third person.

(2) The requesting party, or the requesting party's deposition officer, shall not be required to pay ~~those~~ *the reasonable* costs or any estimate thereof ~~prior to the time~~ *before* the records are available for delivery pursuant to the subpoena, but the witness may demand payment of costs pursuant to this section simultaneous with actual delivery of the subpoenaed records, and until payment is made, *the witness* is under no obligation to deliver the records.

1 (3) The witness shall submit an itemized statement for the costs
2 to the requesting party, or the requesting party's deposition officer,
3 setting forth the reproduction and clerical costs incurred by the
4 witness. ~~Should~~ *If* the costs exceed those authorized in paragraph
5 (1), or *if* the witness refuses to produce an itemized statement of
6 costs as required by paragraph (3), upon demand by the requesting
7 party, or the requesting party's deposition officer, the witness shall
8 furnish a statement setting forth the actions taken by the witness
9 in justification of the costs.

10 (4) The requesting party may petition the court in which the
11 action is pending to recover from the witness all or a part of the
12 costs paid to the witness, or to reduce all or a part of the costs
13 charged by the witness, pursuant to this subdivision, on the grounds
14 that those costs were excessive. Upon the filing of the petition the
15 court shall issue an order to show cause and from the time the
16 order is served on the witness the court has jurisdiction over the
17 witness. The court may hear testimony on the order to show cause
18 and if it finds that the costs demanded and collected, or charged
19 but not collected, exceed the amount authorized by this subdivision,
20 it shall order the witness to remit to the requesting party, or reduce
21 its charge to the requesting party by an amount equal to, the amount
22 of the excess. ~~In the event that~~ *If* the court finds the costs *were*
23 excessive and charged in bad faith by the witness, the court shall
24 order the witness to remit the full amount of the costs demanded
25 and collected, or excuse the requesting party from any payment
26 of costs charged but not collected, and the court shall also order
27 the witness to pay the requesting party the amount of the reasonable
28 expenses incurred in obtaining the order, including attorney's fees.
29 If the court finds the costs were not excessive, the court shall order
30 the requesting party to pay the witness the amount of the reasonable
31 expenses incurred in defending the petition, including attorney's
32 fees.

33 (5) If a subpoena is served to compel the production of business
34 records and is subsequently withdrawn, or is quashed, modified,
35 or limited on a motion made other than by the witness, the witness
36 shall be entitled to reimbursement pursuant to paragraph (1) for
37 all *reasonable* costs incurred in compliance with the subpoena to
38 the time that the requesting party has notified the witness that the
39 subpoena has been withdrawn or quashed, modified, or limited.
40 ~~In the event~~ *If* the subpoena is withdrawn or quashed, if those costs

1 are not paid within 30 days after demand therefor, the witness may
2 file a motion in the court in which the action is pending for an
3 order requiring payment, and the court shall award the payment
4 of expenses and attorney's fees in the manner set forth in paragraph
5 (4).

6 (6) ~~Where the~~ *If records requested pursuant to a subpoena duces*
7 *tecum* are delivered to the attorney, the attorney's representative,
8 or the deposition officer for inspection or photocopying at the
9 witness' place of business, the only fee for complying with the
10 subpoena shall not exceed fifteen dollars (\$15), plus the actual
11 cost, if any, charged to the witness by a third person for retrieval
12 and return of records held offsite by that third person. If the records
13 are retrieved from microfilm, the reasonable ~~cost~~, *costs*, as defined
14 in paragraph (1), ~~shall also apply~~. *applies*.

15 (c) ~~When~~ *If* the personal attendance of the custodian of a record
16 or other qualified witness is required pursuant to Section 1564, in
17 a civil proceeding, he or she shall be entitled to the same witness
18 fees and mileage permitted in a case where the subpoena requires
19 the witness to attend and testify before a court in which the action
20 or proceeding is pending and to any additional costs incurred as
21 provided by subdivision (b).